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# Supreme Court of the United States

OCTOBER TERM, 1964

No. 350

In the Matter of the Application of

ISIDORE BALABAN, PHYLLIS BALABAN, ARTHUR GOTTLIEB and LENORE GOTTLIEB,

*Petitioners,*

for an order under Article 78 of the Civil Practice Act

—against—

MAX J. RUBIN, JAMES B. DONOVAN, CLARENCE SENIOR, JOSEPH G. BARKAN, JOHN F. HENNESSY, MRS. MORRIS SHAPIRO, LLOYD K. GARRISON, MORRIS IUSHEWITZ, and AARON BROWN, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools; BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools; and FRANCIS A. TURNER, Assistant Superintendent of Schools,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

It was almost inevitable that respondents, to oppose certiorari, would find it necessary to rely upon a tortured statement of the case and thus flee from the reality of the

issue as stated by the Court of Appeals, which was bottomed on the facts as found by Special Term (Supreme Court, Kings County).

Despite the insistence by the Court of Appeals that action by the respondent school authorities to adjust "racial balance" or "racial imbalance" was the question before it (Petition, Appendix B, pp. 4a and 7a), respondents repeatedly urge instead that, short of their determination, the new junior high school would have opened in the fall of 1963 as a *de facto* segregated school. This contention that J. H. S. 275 would have been a segregated school was not found to be factual by Special Term, nor does the record support it, except perhaps in the conclusory averments of the affidavit by respondent Turner.

It is also legally untenable. The mere existence of a large percentage of a single ethnic group within a governmentally established unit has no constitutional significance in any event (*Wright* v. *Rockefeller*, 376 U. S. 52).

Coupled with this contention, introduced as a red herring, and the solace respondents would seem to seek in their claim of eliminating "segregation" and promoting "integration", is the unfounded and slighting suggestion that petitioners are trying to compel the respondent school authorities to establish the new junior high school "as a *de facto* segregated school" (Brief in Opposition, pp. 11 and 15). This is simply not so. The absence of petitioners' children from the new school actually has merely reduced the percentage of non-Puerto Rican white children from approximately 31% to approximately 23%.

Furthermore, petitioners' children have attended school in the past with Negro and Puerto Rican children, they do so now, and will undoubtedly do so in the future. Peti-

tioners resent any implication that they are racists or bigots. They feel that they are entitled to object to the assignment, made because they are white, of their children to J. H. S. 275, especially when such assignment is admittedly the result of a political compromise under pressure. Moreover, they particularly object to such a racial selection of their children when it means that their sons and daughters, of tender age, must all face severe traffic hazards and dangerous crossings to attend a school which is out of their own neighborhood, is in another school district, and is in a neighborhood which is properly classified as a high crime rate slum area.*

For respondents further to declaim that the new school is open to all who reside within its zone, regardless of race or color, is also a distortion. It is clear that respondents redrew the school zone boundaries because of the race and color of the particular residents thereby encompassed. Aside from any other indication that this is so (R. 69-70), the tenths in the racial percentages announced by respondents, *viz*: 35.2% Negro, 33.6% Puerto Rican. and 31.2% white (R. 99), could only have been determined by them by an accurate *racial* survey of the school children concerned. And, Special Term found as a fact that the racial and ethnic balance accomplished by moving the zone boundary was not fortuitous but was the result of a fixed purpose on respondents' part to bring more white children into the new school (R. 100).

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* Although not found as a fact by Special Term, the two appellate courts repeated in their opinions respondents' contention that all of the children involved live closer to, or no further from, the new school. Aside from the obvious that distance is no excuse for unconstitutional racial discrimination, the fact is, and it clearly appears from the maps in the record, that some of the children involved would have more street blocks to walk, and more streets to cross, in attending the new school.

This contention by respondents in opposition to the petition for a writ of certiorari, namely that they have done nothing more than adopt a school zone boundary within which all children are required to attend the same school regardless of race, creed, color, or national origin (Brief, pp. 2, 7, 12 and 13), is basic to both their factual and legal arguments. Apart from the factual distortion, it is from a legal viewpoint a mere circumlocution designed to avoid the issue before this Court. A similar argument was made in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347, and rejected by Mr. Justice Frankfurter who said:

> "While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

The respondents in *Gomillion* could, with the same logic employed by respondents here, have argued that the Negro citizens of Tuskegee were not being deprived of any rights since they had exactly the same voting rights after the racially inspired gerrymandering of voting districts in that case that they had before, the only difference being that they had to exercise them in a different municipal entity. It was, of course, the use of race as the basis for drawing the boundary lines that was deemed unconstitutional, precisely the issue before the Court in the instant matter.

Respondents also urge that the petition relies solely upon cases holding that segregation is unlawful, and that the statements declaring all racially based school assignments to be unconstitutional are taken out of context (Brief, pp. 8-11). This argument totally ignores the jury

cases cited by petitioners which clearly hold that governmental determinations based upon race whether for the purpose of exclusion or inclusion of a particular racial group are unconstitutional. No reason is suggested why the jury cases are not decisive of the issues now before this Court. The statements quoted by petitioners from the school segregation cases reflect the continued vitality of the principles of the jury cases.

Respondents would have this Court believe that a case such as *Green* v. *School Board of City of Roanoke, Virginia*, 304 F. 2d 118 (C. A. 4, 1962) (Brief, p. 9), has no applicability to the instant matters. Yet the precise holding in *Green* that "the unequal application of transfer criteria" is unconstitutional (p. 123) is directly applicable to a central issue in this case.

Respondents seek to distinguish *Green* and similar cases such as *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 373 U. S. 683, on two grounds. First, respondents contend these cases are inapplicable because they involved state action to promote racial segregation (Brief, pp. 8-11). Second, by stating as the "facts" of the case before this Court not those facts found by the Special Term (which were undisturbed on appeal), but their own self-serving declarations, presented to and rejected by the Court, respondents seek to imply that their classification of petitioners by race was but one of many equally important criteria they took into account (Brief, pp. 2-6). On this tenuous foundation, they build, for example, their distinction of *Green*, by urging that there such factors as distance were deliberately ignored (Brief, p. 9).

This attempt to brush aside one line of petitioners' authorities collapses when one considers (a) the central factual determination made by the Justice sitting at the

trial level and (b) the rationale of the decisions respondents claim are irrelevant.

Mr. Justice Baker found not only that as the result of a "fixed purpose" on the part of respondents their "determination was based in material part on racial factors" which were "incapable of separation from the other factors alleged to have been considered" (R. 100), but that it was doubly discriminatory. Not just were white children included in the school zone for J. H. S. 275 "upon the basis of their race", but Negro and Puerto Rican children from overcrowded schools were excluded from "access to a new under-utilized school because white children, who do not need a new school, are required to attend." (R. 101).

Nothing justifies respondents' argument that the results in *Goss* v. *Bd. of Education, supra,* or *Green* v. *School Board of City of Roanoke, supra,* turned on the fact that the result of the school boards' transfer plans was maintenance of *de facto* segregation, or that the sole criterion used was race. In *Goss* the Court spelled out what would be a valid determination by school authorities: one which was "not based on any state-imposed racial conditions", or which allowed "transfers to or from any school regardless of the race of the majority therein." (373 U. S. at 688-689). In *Green* the Court stated the legal rationale of its decision as follows (304 F. 2d at 122):

> "This court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what schools pupils shall attend, so long as racial or other arbitrary or discriminatory factors are not considered. (citing cases) But if these criteria, otherwise lawful, are used in a racially discriminatory manner, the resulting assignment is not saved from illegality."

It is thus clear that the use of race as a criterion, not any resulting segregation, is what is fatal; and lengthy argumentative "fact" statements about use of non-racial criteria are totally irrelevant, since if one material test used is race, that factor taints the whole result.

Respondents urge that they have not established a racial quota because there is no evidence that the racial percentages established for J. H. S. 275 are immutable (Brief, pp. 13-14). However, the Court of Appeals in this case held that the issue was whether respondents could adopt a school zone which was intended to and did create a particular set of racial percentages (Petition, Appendix B, p. 4a). That it may exist for one year only does not make it any less a quota. Of course, if respondents' action is upheld they will have the power to adjust the zoning boundary each year to maintain the quota in the face of population shifts.

Respondents also attempt to pass off their action as merely taking "cognizance" of color (Brief, p. 15). However, petitioners demonstrated without contradiction that respondents identified and labelled their children on the basis of their color. Indeed, the pleadings admit this, as Judge Van Voorhis noted (Petition, Appendix B, p. 9a). It is this that petitioners challenge. Had the same treatment been given to children of any other color or race, it would never have been countenanced by any Court. Petitioners believe that the Constitution is truly colorblind, and that they are not to be denied rights granted to others solely because they are white.

## CONCLUSION

Whatever may be respondents' justification for their action here, it should have a full briefing and full argument before determination. That the issue cries out for proper determination seems to us obvious, and might well have influenced respondents not to oppose certiorari even though they believe they are right. In opposing by misstating the issue they merely emphasize their concern that their decision was politically expedient but constitutionally erroneous.

This is made crystal clear by the two concluding sentences of respondents' argument defining the rights of petitioners (Brief, p. 16). We do not agree that we have "a constitutional right to attend an integrated school." We contend, rather, that we have a constitutional right which forbids respondents, or any other officials, from assigning our children to a particular school because of the race and color of the children. It is the implementation of that constitutional right which we urge as the basis for the grant of certiorari.

Respectfully submitted,

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